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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 FAWNETTE S.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL  
14 SECURITY,

Defendant.

Case No. 3:18-cv-05801-TLF

ORDER REVERSING  
DEFENDANT'S DECISION TO  
DENY BENEFITS AND  
REMANDING FOR FURTHER  
PROCEEDINGS

15 Fawnette S. has brought this matter for judicial review of defendant's denial of her  
16 application for supplemental security income (SSI). The parties have consented to have this  
17 matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil  
18 Procedure 73; Local Rule MJR 13. For the reasons below, the undersigned reverses defendant's  
19 decision to deny benefits and remands for further administrative proceedings.

20 I. ISSUES FOR REVIEW

- 21 1. Did the ALJ err in determining that plaintiff's digestive disorder, cervical  
22 radiculopathy, and hand condition did not meet the criteria for listed  
23 impairments?  
24 2. Did the ALJ give adequate reasons to reject opinions from an examining  
25 physician and a treating nurse practitioner?

ORDER REVERSING DEFENDANT'S DECISION TO  
DENY BENEFITS AND REMANDING FOR FURTHER  
PROCEEDINGS - 1

1           3. Did the ALJ give adequate reasons to discount plaintiff’s testimony?

2           4. Should the Court remand for an award of benefits?

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4                           II.     PROCEDURAL BACKGROUND

5           Plaintiff applied for SSI on December 9, 2015, alleging she became disabled beginning in  
6 July 2015. Dkt. 8, Administrative Record (AR) 10. Her application was denied at the initial and  
7 reconsideration levels of administrative review. *Id.* After a hearing, an administrative law judge  
8 (ALJ) issued an unfavorable written decision on November 1, 2017. AR 10-25; *see* AR 30-69  
9 (hearing transcript). The ALJ performed the five-step sequential analysis. AR 10-25. She  
10 determined that there were jobs existing in significant numbers in the national economy that  
11 plaintiff could perform and therefore that plaintiff was not disabled. AR 23-24. Plaintiff filed a  
12 complaint with this Court, seeking reversal and remand for an award of benefits.

13                           III.    STANDARD OF REVIEW

14           The Court will uphold an ALJ’s decision unless: (1) the decision is based on legal error;  
15 or (2) the decision is not supported by substantial evidence. *Revels v. Berryhill*, 874 F.3d 648,  
16 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a reasonable mind might  
17 accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019)  
18 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). This requires “more than  
19 a mere scintilla,” though “less than a preponderance” of the evidence. *Id.*; *Trevizo v. Berryhill*,  
20 871 F.3d 664, 674-75 (9th Cir. 2017).

21           The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759  
22 F.3d 995, 1009 (9th Cir. 2014). The Court is required to weigh both the evidence that supports,  
23 and evidence that does not support, the ALJ’s conclusion. *Id.* The Court may not affirm the  
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1 decision of the ALJ for a reason upon which the ALJ did not rely. *Id.* The Court considers only  
2 the reasons the ALJ identified. *Id.*

3 “If the evidence admits of more than one rational interpretation,” the Court must uphold  
4 the ALJ’s decision. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). That is, “[w]here there  
5 is conflicting evidence sufficient to support either outcome,” the Court ““must affirm the  
6 decision actually made.”” *Id.* (quoting *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).

#### 7 8 IV. DISCUSSION

9 The Commissioner uses a five-step sequential evaluation process to determine whether a  
10 claimant is disabled. 20 C.F.R. § 416.920. The Commissioner assesses a claimant’s residual  
11 functional capacity (RFC) to determine—at step four—whether the claimant can perform past  
12 relevant work. *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013). If the claimant cannot,  
13 then the ALJ reviews—at step five—whether the claimant can adjust to other work. *Id.* The  
14 Commissioner has the burden of proof at step five. *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th  
15 Cir. 1999). The Commissioner can meet this burden by showing that a significant number of jobs  
16 that the claimant can perform exist in the national economy. *Id.*; 20 C.F.R. § 416.920(e).

##### 17 A. Step-Three Listing Determinations

18 Plaintiff contends the ALJ erred at step three of the sequential evaluation process. She  
19 challenges the ALJ’s findings that plaintiff does not have an impairment or combination of  
20 impairments that meets or medically equals Listings 1.00(B)(2), 1.04(A), or 5.08. *See* AR 13-15;  
21 20 C.F.R. Part 404, Subpart P, Appendix 1, §§ 1.00(B)(2), 1.04(A), 5.08.

22 At step three, the ALJ must evaluate the claimant's impairments to decide whether they  
23 meet or medically equal any of the impairments listed in 20 C.F.R. Part 404, Subpart P,  
24 Appendix 1. 20 C.F.R § 416.920(d); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If

1 they do, the claimant is deemed disabled. 20 C.F.R. § 416.920(d). The burden of proof is on the  
2 claimant to establish he or she meets or equals any of the impairments in the listings. *Tackett*,  
3 180 F.3d at 1098. “A generalized assertion of functional problems is not enough to establish  
4 disability at step three.” *Id.* at 1100 (citing 20 C.F.R. § 404.1526). An ALJ “must evaluate the  
5 relevant evidence before concluding that a claimant’s impairments do not meet or equal a listed  
6 impairment.” *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).

7 To meet a listing, a claimant “must have a medically determinable impairment(s) that  
8 satisfies all of the criteria of the listing.” 20 C.F.R. § 416.925(d). To medically equal a listed  
9 impairment, “the medical findings (defined as a set of symptoms, signs, and laboratory  
10 findings)” must be “at least equivalent in severity to the set of medical findings for the listed  
11 impairment.” SSR 83–19, 1983 WL 31248 \*2.

12 1. Listing 5.08, Weight loss due to colitis

13 Plaintiff first contends that the ALJ erred in finding her colitis to be “non-severe” at step  
14 two. After finding colitis is non-severe because “[t]here is no evidence of any work-related  
15 limitations from” it, the ALJ did not assess whether plaintiff’s colitis met or equaled Listing  
16 5.08.

17 Although plaintiff presents this as a challenge to the ALJ’s step-two finding that colitis  
18 was not a severe impairment, such an error is harmless if it does not change the ultimate  
19 disability determination. *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir. 2017) (holding that  
20 because ALJ decided step two in claimant’s favor and was required to consider all impairments  
21 in RFC, whether “severe” or not, “[a]ny alleged error is therefore harmless and cannot be the  
22 basis for a remand”). Because plaintiff alleges that the harm occurred when—at step three—the  
23 ALJ declined to consider plaintiff’s weight loss under Listing 5.08, plaintiff’s challenge is more  
24 properly addressed as a step-three issue.

1 Listing 5.08 requires that a claimant have “[w]eight loss due to any digestive disorder  
2 despite continuing treatment as prescribed, with BMI of less than 17.50 calculated on at least two  
3 evaluations at least 60 days apart within a consecutive 6-month period.” 20 C.F.R. Part 404,  
4 Subpart P, Appendix 1, § 5.08.

5 Plaintiff has not shown harmful error due to the ALJ’s step two finding because she does  
6 not present evidence that would show she meets or equals Listing 5.08. As plaintiff notes, the  
7 record shows that plaintiff consistently had a BMI of less than 17.50, including on evaluations at  
8 least 60 days apart in a consecutive six-month period, *see, e.g.*, AR 360, 383, 666. But plaintiff  
9 does not identify evidence that her low BMI was “due to” her digestive disorder. Although she  
10 points to her testimony that, at the time of the hearing, she was losing weight due to an infection  
11 in her abdomen, that infection had occurred less than a month before the hearing. AR 45-46, 49;  
12 *see also* AR 690-91 (diagnosis of colitis based on July 2017 CT scan). As the Commissioner  
13 points out, other notes in the record indicate that plaintiff’s weight loss was monitored before and  
14 during the relevant period as potentially related to a thyroid condition rather than a digestive  
15 disorder. AR 450, 534, 652. Accordingly, plaintiff has not shown error with respect to the ALJ’s  
16 failure to find colitis a severe impairment or compare it to a listing at step three.

17 Plaintiff also challenges the ALJ’s determination that she did not meet or medically equal  
18 two other listings, due to her neck and hand conditions.<sup>1</sup>

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21 <sup>1</sup> Plaintiff first asserts that the ALJ erred in failing to provide specific reasoning at step three. An ALJ can err at step  
22 three by making only a boilerplate finding that the claimant’s impairments did not meet or equal a listed impairment.  
*Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).

23 Here, the ALJ’s analysis was sufficient. The ALJ made findings, in analyzing Listing 1.02(B), that the evidence  
24 regarding carpal-tunnel syndrome and plaintiff’s right-shoulder disorder did not show “inability to perform gross  
and fine movements effectively.” AR 13. The ALJ further found that plaintiff’s spine disorders did not meet the  
criteria under Listing 1.04. As discussed below, substantial evidence supported these findings.

1           2.       Listing 1.02(B), Loss of functioning in upper extremities

2           To satisfy Listing 1.02(B), a claimant must show

3           Major dysfunction of a joint(s) (due to any cause): Characterized by gross  
4           anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis,  
5           instability) and chronic joint pain and stiffness with signs of limitation of motion  
6           or other abnormal motion of the affected joint(s), and findings on appropriate  
7           medically acceptable imaging of joint space narrowing, bony destruction, or  
8           ankylosis of the affected joint(s). With: . . . Involvement of one major peripheral  
9           joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in  
10          inability to perform fine and gross movements effectively, as defined in 1.00B2c.

11       20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.02(B).

12           The regulations define “[i]nability to perform fine and gross movements effectively” as  
13           “extreme loss of function of both upper extremities; i.e., an impairment(s) that interferes very  
14           seriously with the individual's ability to independently initiate, sustain, or complete activities.”  
15           *Id.*, § 1.00(B)(2)(c). They provide, as examples of inability perform fine and gross movements  
16           effectively, “the inability to prepare a simple meal and feed oneself, the inability to take care of  
17           personal hygiene, the inability to sort and handle papers or files, and the inability to place files in  
18           a file cabinet at or above waist level.” *Id.*

19           The ALJ found that neither plaintiff’s carpal tunnel syndrome nor her right-shoulder  
20           disorder met or medically equaled the severity of Listing 1.02(B) because “there is no evidence  
21           of inability to perform gross and fine movements effectively.” AR 13.

22           Substantial evidence supports this finding. The only medical evidence plaintiff points to  
23           as satisfying these criteria is the vague statement of her treating provider, Deana Dahl, family  
24           nurse practitioner (FNP), that plaintiff “has very limited ability to use upper extremities.” AR  
25           562. Plaintiff points also to her own testimony that she can only use her hands for brief periods  
26           of time. *See* AR 55-56, 58-59, 61-62, 248-50. Plaintiff’s subjective testimony cannot substitute  
27           for medical evidence in making a medical equivalence determination at step three. *See Lewis v.*

1 *Apfel*, 236 F.3d 503, 514 (9th Cir. 2001) (citing C.F.R. § 404.1529(d)(3)). Further, treatment  
2 notes and Dr. Leinenbach’s physical evaluation showed a normal ability to grip, grasp, and hold.  
3 AR 438, 749. The ALJ could reasonably interpret the evidence as not showing “extreme loss of  
4 function” in plaintiff’s arms and hands. AR 13; *see* 20 C.F.R. Part 404, Subpart P, Appendix 1, §  
5 1.00(B)(2)(c).

6 In addition, plaintiff does not attempt to show that her conditions amount to “gross  
7 anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and  
8 chronic joint pain and stiffness.” *See* 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.02(B). Nor  
9 does she point to “findings on appropriate medically acceptable imaging of joint space  
10 narrowing, bony destruction, or ankylosis of the affected joint(s).” *See id.*

11 Plaintiff thus has not shown any error in the ALJ’s finding that her shoulder, wrist, and  
12 hand conditions do not meet or medically equal Listing 1.02(B).

13 3. Listing 1.04(A), Nerve root compression

14 Listing 1.04 comprises “[d]isorders of the spine . . . resulting in compromise of a nerve  
15 root (including the cauda equina) or the spinal cord.” 20 C.F.R. Part 404, Subpart P, Appendix 1,  
16 § 1.04. The listing requires, in addition, evidence of either (A) nerve root compression, (B) spinal  
17 arachnoiditis, or (C) lumbar spinal stenosis resulting in pseudoclaudication, as the regulations  
18 define those conditions. *Id.*

19 Plaintiff challenges the ALJ’s finding that she did not satisfy Listing 1.04(A), which  
20 requires “[e]vidence of nerve root compression characterized by neuro-anatomic distribution of  
21 pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or  
22 muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the  
23 lower back, positive straight-leg raising test (sitting and supine).” 20 C.F.R. Part 404, Subpart P,  
24 Appendix 1, § 1.04(A); *see* AR 14.

1 The ALJ explained only that plaintiff “does not have nerve root compression with the  
2 other cited findings in subsection (A).” AR 14.

3 Substantial evidence does not support this finding. As plaintiff notes, the record contains  
4 support for each of the required findings in Listing 1.04(A): neuro-anatomic distribution of pain,  
5 *see* AR 806; limited motion of the spine, *see* AR 370, 394, 472, 672 687; and motor loss (atrophy  
6 with associated muscle weakness *or* muscle weakness), accompanied by sensory or reflex loss,  
7 AR 347, 360, 373, 406, 664.

8 While the ALJ is responsible for resolving conflicts and ambiguities in the evidence,  
9 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014), neither the ALJ’s  
10 decision nor the Commissioner’s response brief identify any evidence that is inconsistent with  
11 the evidence plaintiff cites. The Commissioner cites several findings regarding plaintiff’s balance  
12 and ability to walk and asserts that plaintiff received conservative treatment. Dkt. 12, p. 8. As  
13 discussed below, the conservative-treatment finding is not supported. And it is unclear how  
14 plaintiff’s ability to balance and walk at an examination is inconsistent with neuro-anatomic  
15 distribution of pain, limitation of motion of the spine, or motor loss. The ALJ apparently  
16 disregarded the numerous treatment notes supporting each of these criteria. Finally, although  
17 plaintiff raised Listing 1.04(A) as her primary argument that she is entitled to disability, AR 36,  
18 the ALJ did not seek medical-expert testimony. *See Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th  
19 Cir. 1999) (affirming where medical expert found that claimant’s condition did not satisfy one  
20 criterion under Listing 1.03).

21 Accordingly, the ALJ lacked substantial evidence for her finding that plaintiff did not  
22 meet Listing 1.04(A). The ALJ erred at step three.



1 B. Plaintiff's Testimony

2 Plaintiff challenges the ALJ's decision to discount her testimony about the nature and  
3 severity of her symptoms. Plaintiff testified that she has numbness in her hands that lasts 20 to 60  
4 minutes. AR 41-42, 55-62. She also testified about limitations from pain in her back, neck, and  
5 right shoulder impairments. AR 43-44, 52-54, 56-62.

6 In weighing a plaintiff's testimony, an ALJ must use a two-step process. First, the ALJ  
7 must determine whether there is objective medical evidence of an underlying impairment that  
8 could reasonably be expected to produce some degree of the alleged symptoms. *Trevizo v.*  
9 *Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). If the first step is satisfied and there is no evidence  
10 of malingering, the second step allows the ALJ to reject the claimant's testimony of the severity  
11 of symptoms if the ALJ can provide specific findings and clear and convincing reasons for  
12 rejecting the claimant's testimony. *Id.*

13 Here, the ALJ reviewed the medical record with respect to each of plaintiff's impairments  
14 and concluded that plaintiff was not as limited as she testified. AR 16-20. In the RFC, the ALJ  
15 found that plaintiff can perform light work, only occasionally stoop, kneel, crouch, or climb  
16 ramps and stairs, and only occasionally reach overhead, but that she can reach frequently in other  
17 directions and handle and finger frequently. AR 15.

18 The ALJ failed to give clear, convincing, and supported reasons for discounting  
19 plaintiff's testimony about her back, neck, and shoulder conditions.

20 First, the ALJ found, generally, that plaintiff's "daily activities are inconsistent with her  
21 allegations of debilitating symptoms." AR 16. She noted that plaintiff performed some household  
22 chores, cared for her pets, and spent time with her aunt, and that she smokes 10 cigarettes per  
23 day. *Id.* The ALJ noted that at one point, plaintiff reported bundling wood, and at another that  
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1 she gardened and “infrequently” rode horses. *Id.*; see AR 432, 532. She also reported caring for  
2 her five-year-old granddaughter in 2016. AR 444.

3 Plaintiff’s activities do not provide a clear and convincing reason to reject her testimony.  
4 The ALJ relied on plaintiff’s activities to reject her claim of disability in general, but she did not  
5 identify how specific activities undermine specific testimony. Most of the activities the ALJ  
6 noted are not the type that can be readily transferred to a work setting. *See Diedrich v. Berryhill*,  
7 874 F.3d 634, 643 (9th Cir. 2017) (“House chores, cooking simple meals, self-grooming, paying  
8 bills, writing checks, and caring for a cat in one’s own home, as well as occasional shopping  
9 outside the home, are not similar to typical work responsibilities.”).

10 The record does not demonstrate that plaintiff has engaged in these activities either at a  
11 frequency or to an extent that would indicate that she can “spend a substantial part of . . . her day  
12 performing” them. *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996). And although  
13 bundling wood, gardening, and riding horses could conceivably be inconsistent with parts of  
14 plaintiff’s testimony, the ALJ did not make such connections, and the record does not contain  
15 evidence about how frequently plaintiff engages in these activities or what physical functions  
16 they require as plaintiff performs them. *See Trevizo*, 871 F.3d at 682.

17 Second, with respect to plaintiff’s right shoulder, the ALJ found that objective findings  
18 did not support the degree of limitation plaintiff alleged. AR 17. Inconsistency with objective  
19 evidence can satisfy the clear and convincing requirement. *Regennitter v. Commissioner of*  
20 *Social Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998). But an ALJ may not reject a claimant’s  
21 subjective symptom testimony “solely because the degree of pain alleged is not supported by  
22 objective medical evidence.” *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995) (internal  
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1 quotation marks omitted and emphasis added); *Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir.  
2 1995) (applying rule to subjective complaints other than pain).

3         The ALJ lacked support for her finding that the objective evidence undermines plaintiff's  
4 testimony about her shoulder condition. While the ALJ cited an "unremarkable" x-ray and  
5 imaging that showed plaintiff's humerus was not fractured, it is unclear how these undermine  
6 plaintiff's claims of shoulder pain and resulting limitations, which the record suggests are due to  
7 rotator cuff syndrome or tendonitis. AR 438, 650, 665; *see Ghanim v. Colvin*, 763 F.3d 1154,  
8 1164 (9th Cir. 2014) (ALJ may not "cherry-pick[ ]" items from treatment record without  
9 considering them in context of "diagnoses and observations of impairment"). The only other  
10 finding the ALJ cited was full muscle strength in a 2016 examination, AR 438. Yet the same  
11 examination showed limited range of motion in abduction, adduction, extension, and flexion;  
12 "focal tenderness along the anterior aspect"; positive impingement tests; and positive right arc  
13 test. AR 438. The rest of the record is replete with objective findings showing tenderness and a  
14 limited, painful range of motion in plaintiff's right shoulder. *See* AR 648, 659, 664, 674.

15         Third, the ALJ found, separately, that plaintiff received conservative treatment for her  
16 shoulder and back impairments. AR 17-18. She found that plaintiff's shoulder condition was  
17 treated conservatively with medication and home exercises. AR 17. She likewise found that  
18 plaintiff's cervical spine condition received conservative treatment, including home stretching  
19 exercises. AR 18-19.

20         Medical treatment notes do not support the ALJ's findings; the record shows that  
21 plaintiff's treatment for these impairments overlapped and was not conservative. Regarding  
22 plaintiff's shoulder treatment, the ALJ cited a single note indicating that plaintiff was prescribed  
23 "alternating heat, Ibuprofen, and gentle range of motion exercises." AR 17; *see* AR 653. Yet at  
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1 the same visit—and throughout the relevant period—plaintiff was continued on Norco  
2 (hydrocodone-acetaminophen), an opioid medication. AR 653. Likewise, in finding that  
3 plaintiff’s cervical spine condition received conservative treatment, the ALJ cited a single  
4 treatment note recommending home stretching exercises. AR 18-19; *see* AR 669. At that visit,  
5 plaintiff was again continued on Norco, as treatment for “[c]hronic pain syndrome.” AR 669.

6 Plaintiff was prescribed Norco consistently during the relevant period. At some visits,  
7 plaintiff’s providers indicated it was to treat her shoulder pain, her back condition, or both, AR  
8 640, 654, 658, 660, 679; but at many other visits, it was prescribed to treat “chronic pain  
9 syndrome,” AR 673, 676, 684, 686. Plaintiff was prescribed another opioid, Percocet  
10 (oxycodone-acetaminophen) for her neck condition. AR 680.

11 An ALJ may rely on conservative treatment in discounting a claimant’s symptom  
12 testimony. *See Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (holding that over-the-  
13 counter pain medication is “conservative treatment”). But a powerful pain killer, such as,  
14 “consistent use of Norco, a strong opioid medication, cannot accurately be described as  
15 ‘conservative’ treatment.” *Bucknell v. Berryhill*, No. ED CV 18-0261 AS, 2018 WL 6198459, at  
16 \*4 (C.D. Cal. Nov. 27, 2018) (unpublished) (collecting cases).

17 Accordingly, the ALJ did not offer clear and convincing reasons, supported by substantial  
18 evidence, to reject plaintiff’s testimony about symptoms and limitations from her shoulder, neck,  
19 and back conditions.

20 In contrast, the ALJ offered sufficient reasons to discount plaintiff’s testimony about her  
21 hand pain and carpal tunnel syndrome. The ALJ found that Dr. Leinenbach’s exam findings on  
22 plaintiff’s wrists and hands were inconsistent with plaintiff’s allegations of limitations from  
23 carpal tunnel syndrome. AR 16-17; *see* AR 438. This finding is supported: Dr. Leinenbach made  
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findings of intact gross and fine motor skills, motor strength, bulk, and tone, and sensation. AR 438. While he found positive Phalen's signs and Tinel's signs in both wrists, he opined that plaintiff would have no limitations in handling, fingering, and feeling. AR 438-39. Dr. Leinenbach's objective findings and opinion regarding the limitations plaintiff's hand and wrist impairments would cause provided clear and convincing reasons to discount plaintiff's testimony about those impairments. *See Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

C. Medical Opinion Evidence

Plaintiff next challenges the ALJ's decision, in assessing plaintiff's RFC, to discount opinions from her treating provider, Deana Dahl, FNP, and an examining physician, Derek Leinenbach, M.D. The ALJ failed to give specific, legitimate, and supported reasons to reject Dr. Leinenbach's opinion. The ALJ erred in rejecting Dr. Leinenbach's opinion about plaintiff's reaching limitations.

The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Trevizo v. Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017) (quoting *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)). Even when a treating or examining physician's opinion is contradicted, an ALJ may only reject that opinion "by providing specific and legitimate reasons that are supported by substantial evidence." *Id.*

Dr. Leinenbach examined plaintiff in March 2016. AR 436. The ALJ for the most part adopted Dr. Leinenbach's opinions. AR 22. But the ALJ rejected Dr. Leinenbach's statement that plaintiff is limited to "occasionally" reaching with her right arm. AR 439. The ALJ found this statement inconsistent with Dr. Leinenbach's own exam findings and inconsistent "with the longitudinal treatment record showing conservative treatment for this impairment." AR 22. (The ALJ had concluded in weighing plaintiff's testimony about her right shoulder that "[t]he record

1 as a whole supports some limitations . . . but does not support the debilitating limitations she  
2 described.” AR 17.) The ALJ limited plaintiff to occasional overhead reaching but found she  
3 could frequently reach in other directions. AR 15.

4 ALJ’s finding is not supported by the record. Dr. Leinenbach made the following  
5 findings as to plaintiff’s right shoulder: “focal tenderness along the anterior aspect”; positive  
6 impingement tests; and positive right arc test. AR 438. The ALJ offered no explanation of how  
7 these findings are inconsistent with Dr. Leinenbach’s opinion that plaintiff is limited to  
8 occasional reaching with the right arm, and none is apparent.

9 And, as discussed above, the record does not support the ALJ’s finding that plaintiff  
10 received conservative treatment for her right shoulder. Plaintiff reported severe pain April 2016;  
11 her provider found decreased strength, tenderness, and “severe pain with minimal ROM [range  
12 of motion].” AR 651. Her medical provider ordered an MRI and recommended in the meantime  
13 alternating ice and heat, ibuprofen, and gentle ROM exercises. AR 651-52. Her provider made  
14 objective findings in June and September 2016, including decreased ROM, tenderness, and  
15 effusion. AR 659-60, 669. She reviewed and refilled plaintiff’s medications and scheduled  
16 plaintiff with a specialist. AR 669. Plaintiff “had to reschedule” a cortisone injection in  
17 December 2016, and her provider noted she had “recommended PT but that made her symptoms  
18 worse.” AR 675. Throughout this period plaintiff was being prescribed opioid medications for  
19 her severe pain.

20 The ALJ did not explain how this constitutes “conservative treatment” inconsistent with  
21 an occasional-reaching limitation. *See Revels*, 874 F.3d at 667 (reversing where ALJ did not  
22 explain how treatment for fibromyalgia was “conservative”). As explained above, consistent pain  
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1 treatment using opioids would not be fairly characterized as “conservative.” *See O’Connor v.*  
2 *Berryhill*, 355 F. Supp. 3d 972, 985 (W.D. Wash. 2019).

3 Even where a treating physician’s opinion is brief and conclusory, an ALJ must consider  
4 its context in the record—especially the physician’s treatment notes. *See Burrell v. Colvin*, 775  
5 F.3d 1133, 1140 (9th Cir. 2014) (holding ALJ erred in finding treating opinion “conclusory” and  
6 supported by “little explanation,” where ALJ “overlook[ed] nearly a dozen [treatment] reports  
7 related to head, neck, and back pain”); *Revels v. Berryhill*, 874 F.3d 648, 663 (9th Cir. 2017)  
8 (finding ALJ erred in rejecting treating physician’s opinion as supported by “little explanation,”  
9 where record included treatment notes supporting the opined limitations). Here, the ALJ’s  
10 consideration of the record was flawed: as discussed above, the ALJ erred in evaluating the  
11 record when making a step three determination, in discounting plaintiff’s testimony, and in  
12 rejecting Dr. Leinenbach’s examining opinion, and that error reflected a serious misreading of  
13 the record. Thus, the record does not support the ALJ’s conclusion regarding plaintiff’s physical  
14 RFC. Accordingly, on remand the ALJ must consider the treating opinion of FNP Dahl, as well  
15 as Dr. Leinenbach, in the full context of the treatment record, before arriving at an RFC  
16 assessment.

17 D. Lay Testimony

18 Plaintiff also assigns error to the ALJ’s consideration of plaintiff’s husband’s testimony.  
19 The ALJ found the testimony of plaintiff’s husband inconsistent with objective medical  
20 evidence, treatment history, and plaintiff’s demonstrated level of functioning. The ALJ also  
21 found that plaintiff’s husband based his testimony on plaintiff’s own report rather than making  
22 objective statements.

23 The statements of plaintiff’s husband do not support the ALJ’s finding that they are based  
24 on plaintiff’s self-reports; rather, they consist primarily of the husband’s observations of what

1 plaintiff is capable of. *See* AR 268-75. And because, as discussed above, the ALJ made  
2 numerous errors in evaluating both the medical evidence and plaintiff's testimony, and the ALJ  
3 relied on those flawed analyses in evaluating the lay witness testimony, the ALJ should reweigh  
4 that testimony on remand.

5 E. Remand with Instructions for Further Proceedings

6 “‘The decision whether to remand a case for additional evidence, or simply to award  
7 benefits[,] is within the discretion of the court.’” *Trevizo v. Berryhill*, 871 F.3d 664, 682 (9th Cir.  
8 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If an ALJ makes an  
9 error and the record is uncertain and ambiguous, the court should remand to the agency for  
10 further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Likewise, if the  
11 court concludes that additional proceedings can remedy the ALJ's errors, it should remand the  
12 case for further consideration. *Revels*, 874 F.3d at 668.

13 The Ninth Circuit has developed a three-step analysis for determining when to remand  
14 for a direct award of benefits. Such remand is generally proper only where

15 “(1) the record has been fully developed and further administrative proceedings  
16 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient  
17 reasons for rejecting evidence, whether claimant testimony or medical opinion;  
and (3) if the improperly discredited evidence were credited as true, the ALJ  
would be required to find the claimant disabled on remand.”

18 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014)).

19 The Ninth Circuit emphasized in *Leon v. Berryhill* that even when each element is  
20 satisfied, the district court still has discretion to remand for further proceedings or for award of  
21 benefits. 80 F.3d 1041, 1045 (9th Cir. 2017).

22 Here, plaintiff asks that the Court remand for an award of benefits based on the ALJ's  
23 errors (1) at step three and (2) in rejecting the opinions of Dr. Leinenbach and FNP Dahl. Dkt.  
24 10, p. 19.



1 Plaintiff further contends that the Court should remand for benefits because the evidence  
2 shows that her spinal condition satisfies each of the requirements under Listing 1.04(A) and she  
3 is therefore presumptively disabled at step three. But because the evidence does not definitively  
4 establish that plaintiff's spinal impairments meet or medically equal the criteria of Listing  
5 1.04(A), remand for further consideration of that issue is warranted.

6 Plaintiff further contends that if Dr. Leinenbach's and FNP Dahl's testimony is credited  
7 as true, plaintiff would be unable to perform her past work. However, the vocational expert  
8 indicated that, with the "occasional reaching in all directions" limitation Dr. Leinenbach found,  
9 plaintiff would be able to work as a price marker, a job with 107,000 positions nationally. AR  
10 65-66. Moreover, even if the ALJ erred in rejecting FNP Dahl's opinions, FNP Dahl did not  
11 offer an opinion on specific functional limitations and their duration. *See* AR 452-53, 562, 749.  
12 The Court cannot conclude that, if credited as true, FNP Dahl's testimony would demonstrate  
13 that plaintiff is disabled. *See Trevizo*, 871 F.3d at 682-83.

14 V. CONCLUSION

15 Based on the above analysis, the Defendant's decision to deny benefits is REVERSED  
16 and this matter is REMANDED to the Social Security Administration for further proceedings.

17 Dated this 14th day of August, 2019.

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20 

21 Theresa L. Fricke  
22 United States Magistrate Judge  
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